No. 17-1705

In The Supreme Court of the United States

PDR NETWORK, LLC, *et al.*,
Petitioners,

v.

CARLTON & HARRIS CHIROPRACTIC, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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Petitioners PDR Network, LLC, PDR Distribution, LLC, and PDR Equity, LLC (collectively, "PDR") respectfully submit this reply brief addressed to new points raised in the Brief in Opposition ("Resp. Br.") to their petition for a Writ of Certiorari to review and reverse the judgment of the United States Court of Appeals for the Fourth Circuit.

ARGUMENT

Do courts possess the inalienable jurisdiction to independently analyze statutes and determine the proper level of deference afforded interpretive agency guidance under *Chevron USA, Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984)—as PDR asserts? Or should this core jurisdiction be stripped away, such that courts must automatically "defer" to such guidance if said agency happens to be identified in the Hobbs Act, 28 U.S.C. § 2342—as Respondent claims? Review is needed to clarify this complex question that has spawned numerous circuit splits, confounded jurists, and permitted agency guidance to impermissibly usurp the judiciary's "province and duty" to "say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177, 1 Cranch 137, 2 L.Ed 60 (1803).

In opposing PDR's petition for certiorari, Respondent confirms exactly why review is needed.

First, Respondent claims this Court should deny certiorari because the Fourth Circuit's split panel decision was just the next in a line of circuit opinions holding the Hobbs Act precludes district courts from determining whether FCC orders are entitled to deference. In so arguing, Respondent ignores a critical distinction: each prior opinion involved a prohibited "facial challenge" to the "validity" of the

agency order. But there was no such challenge to the "validity" of the 2006 FCC Rule here. Circuit Judge Stephanie D. Thacker aptly characterized such authority as "inapposite" or "distinguishable" in her dissent. App. 23a-24a. Yet Respondent persists in wrongly claiming this case is "nothing unique."

Whether the Hobbs Act trumps *Chevron*—absent a challenge to the "validity" of an agency order—is a "unique" and substantial question of law. If the Fourth Circuit's ruling is allowed to stand, the Hobbs Act will be expanded beyond the parameters Congress intended. And the practical implications reach far beyond this dispute concerning the FCC interpreting the Telephone Consumer Protection Act of 1991 ("TCPA"), 47 U.S.C. § 227. A ruling from this Court will dictate whether *all* lower courts are "precluded" from exercising their jurisdiction to independently assess Congress's meaning under *Chevron*, and should automatically "defer" to guidance issued by any of the numerous agencies identified in the Hobbs Act. 28 U.S.C. § 2342(1)-(7).

Second, by not raising the issue in its brief, Respondent has waived any argument concerning the Fourth Circuit improperly erasing the necessary "commercial nexus" to a firm's business for faxes promoting "free" offerings to be considered "advertisements." *See* Sup. Ct. R. 15.2.

Third, there is a profound circuit split concerning the scope of the 2006 FCC Rule. While Respondent tries to explain away this split between the Fourth and Second circuits as a "minor difference of interpretation," the reality is these circuits are diametrically opposed. The Second Circuit in *Physicians Healthsource, Inc. v. Boehringer Ingelheim Pharm., Inc.*, 847 F.3d 92 (2d Cir. 2017),

expressly rejected the Fourth Circuit's "*per se* rule" in favor of a "rebuttable presumption" that a fax offering free goods and services is a "pretext" for a commercial promotion or sale. On remand, this "minor difference" proved dispositive—the presumption *was* rebutted, and the case dismissed. Under the Fourth Circuit's "*per se* rule," PDR (and others) would instead be deprived of the same opportunity to prove the absence of a "pretext."

Based on the number of TCPA fax cases filed since the FCC issued its guidance; the growing number of cases concerning the 2006 FCC Rule; and the impracticalities of PDR (and others) obtaining "judicial review" or other relief via a Hobbs Act proceeding; a unified answer can only come from this high Court.

I. THE JURISDICTIONAL QUESTION IN THIS CASE IMPACTS EVERY COURT IN THE NATION, AND IS ALONE SUFFICIENT TO WARRANT REVIEW

PDR identified three splits caused, or exacerbated, by the Fourth Circuit's ruling. Pet. Br. at 13-28. While two of these splits relate to the TCPA or certain fax communications, the jurisdictional question implicates how all courts will treat innumerable orders from multiple agencies.

A. There Is A Circuit Split Concerning The Interplay Between The Hobbs Act And *Chevron* Deference When The "Validity" Of An Agency Order Has Not Been Challenged.

Respondent claims there is "no circuit split" on this jurisdictional question because "[e]very circuit" to address it has held a final order of the FCC

interpreting the TCPA may be reviewed only by the court of appeals in a Hobbs Act proceeding. Resp. Br. at 7. Respondent then claims PDR is "asking this Court to allow the district court to hold that this rule *conflicts with* the 'unambiguous' statute and is, therefore, not entitled to 'substantial deference'[.]" *Id.* (emphasis added). Respondent is wrong on both accounts, and has misconstrued PDR's position.

1. The Sixth Circuit could not have been clearer when it noted the existence of a circuit split on this precise question:

> There is a circuit split regarding whether to defer to the Commission's explanation of its definition [of the term 'advertisement.']

Sandusky Wellness Ctr., LLC v. Medco Health Sols., Inc., 788 F.3d 218, 223 (6th Cir. 2015) (citations omitted).

Respondent next turns a blind eye to a critical distinction: while the cases it relied upon all involved prohibited "facial challenges" to the agency order, Resp. Br. at 7-12, *there was no such challenge to the 2006 FCC Rule here.* Pet. Br. at 17. Judge Thacker, in her dissent, addressed this discrepancy—observing how PDR had *not* argued the 2006 FCC Rule was contrary to the "plain language" of the TCPA. *Id.* Instead, the District Court "assumed" the 2006 FCC Rule "was valid" and "harmonized" it with the TCPA to hold the Fax was not an "advertisement." App. 21a, 24a, 41a. This, in turn, avoided any concern over: (i) a challenge to the order's "validity"; and (ii) whether not automatically deferring somehow meant the District Court disagreed with, or ignored, the FCC's guidance. *Id.*

This case is, accordingly, "unique" for this reason. Because there was no challenge to the 2006 FCC Order's "validity," the Fourth Circuit should have allowed the District Court to conduct a "traditional" *Chevron* analysis. Pet. Br. at 11, 17, 20. If permitted to stand, the Fourth Circuit's imprudent ruling would mark the first time a district court was so "precluded" under the Hobbs Act absent such a challenge. Merely by invoking the Hobbs Act—and alleging an order's "validity" is being challenged, even when it is not—litigants could unilaterally hamstring the judiciary's role in analyzing statues.

2. Recognizing the threat *Sandusky* represents, Respondent attempts to minimize its impact by claiming "*Sandusky* did not mention the Hobbs Act." Resp. Br. at 14. But that is precisely PDR's point.

By reaching the merits, the Sixth Circuit did not deem the Hobbs Act a jurisdictional bar to independently analyze the TCPA. Rather, the Sixth Circuit considered whether the term "advertisement" was ambiguous under *Chevron*, and assessed the level of deference afforded the FCC's guidance, holding: "where our 'construction follows from the unambiguous terms of the statute'—as it does here—we do not defer to the agency's interpretation." 788 F.3d at 223.[1] *See also Satterfield v. Simon &*

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[1] Respondent claims *Sandusky* did not "involve a fax offering 'free goods or services,' implicating the 2006 FCC Rule." Resp. Br. at 14. But the 2006 FCC Rule was unquestionably "implicat[ed]." *Sandusky* involved two faxes discussing a formulary of medications that defendant Medco, like PDR here, neither manufactured nor sold. 788 F.3d 224. In determining if these faxes constituted "advertisements," *Sandusky* cited the same section of the 2006 FCC Rule at issue here—*twice*. 788 F.3d at 223 (noting the FCC issued regulations concerning the definition of an "advertisement," and then "expound[ed]" on

Schuster, Inc., 569 F.3d 946, 951 (9th Cir. 2009) (because the term "automatic telephone dialing system" in the TCPA was "clear and unambiguous," court conducted a *Chevron* analysis of FCC's 2003 interpretation with no mention of the Hobbs Act).

Boehringer provides an even more decisive example. After noting the inconsistent manner[2] in which the Fourth Circuit treated *Sandusky* and *Boehringer*, Pet. Br. at 18 n.5, Judge Thacker observed how, in *Boehringer*, "[t]here was no facial challenge to the 2006 FCC Rule," and "the district court did not determine that the TCPA and the 2006 FCC Rule were in conflict." App. 22a. Judge Thacker also observed that while the plaintiff Physicians Healthsource argued the district court violated the Hobbs Act because it "refused to apply the plain language of the [2006 FCC R]ule," the "*Second Circuit did not address this argument and instead addressed the merits.*" *Id.* (emphasis added).

Twice in the last five months this Court has reaffirmed that deference to an agency "is not due unless a 'court, employing traditional tools of statutory construction,' is left with an unresolved ambiguity." *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1630 (2018); *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1358 (2018). This Court should grant certiorari to preserve this doctrine from collateral attack based on an agency's mere inclusion in the Hobbs Act.

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that definition via the 2006 FCC Rule); *id.* at 225 (referencing "the free-seminar example" from the 2006 FCC Rule).

[2] Judge Thacker called out the majority for improvidently deeming *Sandusky* as not "persuasive," while considering Judge Leval's concurrence in *Boehringer* to be "persuasive," despite the fact neither addressed the Hobbs Act. App. 22a.

3. Contrary to Respondent's claim, Resp. Br. at 7, PDR has never argued the District Court should "ignore," "invalidate" or hold the 2006 FCC Rule "conflicts" with the TCPA. Pet. Br. at 9-10. Rather, as Judge Thacker observed, "[PDR] merely argued for a specific interpretation of the 2006 FCC Rule, and [Respondent] argued for a different interpretation." App. 24a. Respondent's attempt to distort PDR's argument—and Judge Thacker's dissent[3]—is not well-taken.

II. RESPONDENT CONCEDES THAT A CIRCUIT SPLIT EXISTS REGARDING WHETHER A "COMMERCIAL NEXUS" IS REQUIRED FOR TCPA LIABILITY

PDR detailed how the Fourth Circuit's holding—which erased the requirement that a fax promoting free goods or services have a "commercial aim"—was erroneous; conflicted with the Second, Sixth, Ninth and Eleventh Circuits; and was unique in the national jurisprudence. Pet. Br. at 21-23. In response, Respondent argues only that these TCPA faxes cases "did not appl[y]" the 2006 FCC Rule. Resp. Br. at 15, 18-19.

Setting this artificial distinction aside, the Second Circuit—which *did* apply the 2006 FCC Rule—specifically held: "[t]here must be a

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[3] What the dissent actually discussed is how safeguards exist to ensure courts do not end-run around the Hobbs Act. For example, invalidation can occur at *Chevron* step one if a court finds "the agency's construction is in conflict with the unambiguous statutory language." App 20a. Again, that did not happen here. Pet. Br. at 15. Courts can also accept an order as "valid" and decide if it applies without running afoul of the Hobbs Act. *Id.* at 14-15, 19 n.6.

commercial nexus to a firm's business," and "we agree that a fax must have a commercial purpose." *Boehringer,* 847 F.3d at 93, 95-96. By failing to address this clear error of law, and circuit split[4], Respondent concedes both points. Sup. Ct. R. 15.2.

III. THERE IS A CIRCUIT SPLIT AS TO THE MEANING OF THE 2006 FCC RULE THAT WARRANTS THIS COURT'S REVIEW

The Fourth Circuit's ruling and *Boehringer* are incongruous. Despite each panel interpreting the *exact same provision* of the 2006 FCC Rule, the Fourth Circuit held a fax offering free goods and services was "*per se*" an "advertisement." Pet. Br. at 23. But the Second Circuit rejected this "*per se* rule" in favor of a "rebuttable presumption" that such a fax is a pretext or prelude to a commercial promotion or sale offer. *Id.* This legal distinction proved dispositive in *Boehringer* on remand. *Id.*

Respondent claims this mere "difference of interpretation" does not warrant review because the result "would have been the same under either ruling." Resp. Br. at 16-17. Respondent is mistaken.

Respondent's speculation that the *Boehringer* court "would have reversed the district court's dismissal" is meritless. *Id.* at 16. To reach this conclusion, Respondent misinterprets the question in *Boehringer* as solely based on whether the fax broadly "relates to [the sender's] business." *Id.* at 17.

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[4] *Mauthe v. Optum, Inc.*, 2018 U.S. Dist. LEXIS 125796, at *9 n.2 (E.D. Pa. July 27, 2018) ("There is disagreement in the federal courts regarding the scope of rule. Specifically, some courts [*Boehringer*] require plaintiffs to still prove that the fax has a 'commercial nexus,' whereas others [*Carlton*] have held that it is a de facto rule.") (citations omitted).

But this is not the test to determine if a fax is an "advertisement."[5] As Judge Thacker observed, there must be a "plausible" conclusion that the subject fax had "the commercial purpose of promoting those products or services." App. 30a-31a.

And even assuming *arguendo* that the *Sandusky* or *Boehringer* courts would have reversed the District Court, Resp. Br. at 18, the ensuing question is what that reversal would entail. Under either case, PDR could "rebut" the presumption the Fax is a pretext for an "advertisement" by "proceeding to discovery." *Id.* Under the Fourth Circuit's "*per se* rule," despite Respondent conceding: (i) the *Physicians' Desk Reference* is an "informational resource"; (ii) it is "free to recipients"; and (iii) PDR "does not sell the reference or sell anything in the reference," App. 35a, the Fax has been improperly branded an "advertisement."[6]

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[5] *Mauthe*, 2018 U.S. Dist. LEXIS 125796, at *14-15 ("plaintiff here argues that whenever a business sends a fax to 'further its own economic interests' the fax is an 'unsolicited advertisement' under *Carlton*. This reading of *Carlton* is plainly incorrect.").

[6] The Fourth Circuit found the District Court's apprehension about the lack of a "commercial" nexus between PDR's business and the Fax unwarranted because PDR "receive[d] money from pharmaceutical companies whose drugs are listed in the *Physicians' Desk Reference*." App. 17a. It was thus *possible* "the amount of money [PDR] receives turns on how many copies . . . it distributes." *Id.* And it was also *possible* PDR was incentivized to distribute e-books, and was acting to "further its own economic interests," rather than provide a free service. *Id.* The irony, however, is under the Fourth Circuit's draconian "*per se* rule," PDR's opportunity to rebut such erroneous speculation ends at the pleading stage.

IV. THIS APPEAL HAS IMMENSE PRACTICAL SIGNIFICANCE BEYOND THIS DISPUTE

The outcome of this appeal will help guide future *Chevron* analyses, TCPA litigations, and any other statutory dispute for which an agency identified in the Hobbs Act has issued interpretive guidance.

1. Respondent claims the fax machine's purported "obsolescence" makes it "unlikely" there will be "many more" cases involving the 2006 FCC Rule. Resp. Br. at 17-18. This is demonstrably false. Both the Sixth and D.C. Circuits have observed the fax machine "is not extinct" and "lives on." *Bais Yaakov of Spring Valley v. FCC*, 852 F.3d 1078, 1079 (D.C. Cir. 2017) (Kavanaugh, J.); *Sandusky*, 788 F.3d at 220. Criticizing the specific technology—while ignoring the larger legal implications—is shortsighted.[7]

Regardless, the number of TCPA *cases* involving fax "advertisements" has never been higher. Since May 3, 2006—the date the 2006 FCC Order was issued—there have been 1,342 federal court opinions and 240 state court opinions involving either fax advertisements or discussing this aspect of the TCPA.[8] Of those, twenty-seven federal cases spread across nine circuits have cited the 2006 FCC Order;

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[7] *See Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663 (2016) (TCPA case involving text messages provided vehicle to consider standing, sovereign immunity and mootness); *see also Mims v. Arrow Fin. Servs., LLC*, 565 U.S. 368 (2012) (TCPA case involving auto-dialed calls provided vehicle to decide concurrent jurisdiction of federal/state courts).

[8] Respondent's counsel has itself been involved in no less than 160 such cases during this same period, including twenty-three cases in the last two years, and two in the last five months.

thus, it can hardly be said this order is "rarely implicated in TCPA litigation." Resp. Br. at 17.

2. Finally, Respondent claims the Hobbs Act does not preclude an FCC order from being subject to "judicial review." Resp. Br. at 14. The Hobbs Act does not supply a viable—or practical—solution.

Under the Hobbs Act, a party who participated in the administrative proceedings must challenge the agency's rule within 60 days of its entry. 28 U.S.C. § 2344. A party that did not participate lacks standing to do so. *Nat'l Ass'n of State Util. Consumer Advocates v. FCC*, 457 F.3d 1238, 1247 (11th Cir. 2006), *modified on other grounds on denial of reh'g*, 468 F.3d 1272 (11th Cir. 2006). Once a rule has been promulgated, a party—including a party that did not participate—has 30 days to petition the agency for reconsideration. 47 U.S.C. § 405(a).

Here, PDR's time to seek reconsideration of the 2006 FCC Rule expired nine years *before* this case. Were PDR to seek administrative relief via a *new* petition for a declaratory ruling from the FCC, there is no guarantee when—*or if*—the FCC would rule. 47 C.F.R. § 1.2. And even if the FCC were to rule, the process of petitioning for, receiving, and seeking "judicial review" via a Hobbs Act proceeding—and subsequent appeal—could take well over a decade.[9]

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[9] *See, e.g., Bais Yaakov*, 852 F.3d 1078, *cert. denied*, 138 S. Ct. 1043 (2018) (twelve years from issuance of FCC order until judicial review concluded); *Nack v. Walburg*, 2011 U.S. Dist. LEXIS 8266 (E.D. Mo. Jan. 28, 2011), *remanded*, 715 F.3d 680 (8th Cir. 2013), *cert. denied*, 134 S. Ct. 1539 (2014) (eight years from issuance of FCC order until judicial review concluded); *ACA Int'l v. FCC*, 885 F.3d 687 (D.C. Cir. 2018) (three years).

CONCLUSION

The petition for a writ of certiorari should be granted.

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